

FILED  
BILLINGS DIV.

IN THE UNITED STATES DISTRICT COURT

2008 APR 23 AM 11 22

FOR THE DISTRICT OF MONTANA

PATRICK E. DUFRENE, CLERK

BY

DEPUTY CLERK

BUTTE DIVISION

MELANIE J. PARRISH, JUSTIN CLAY, )  
MAYA CLAY, ASHLEY PARRISH, )  
ELIZABETH PARRISH, CAROLYN )  
PARRISH and LARRY PARRISH, )

Plaintiffs, )

vs. )

DAVID SCHENK, individually and )  
as the Sheriff and Agent of Madison )  
County; DOUGLAS YOUNG, individually )  
and as a deputy sheriff and agent of )  
Madison County; ROGER THOMPSON, )  
individually and as a deputy sheriff and )  
agent of Madison County, )  
THEODORE COFFMAN, individually )  
and as agent of Madison County; )  
DAVID SCHULZ, individually )  
and as agent of Madison County; and )  
MADISON COUNTY, a political )  
subdivision of the State of Montana; )  
CHAD McFADDEN, individually and as )  
a deputy sheriff and agent of Jefferson )  
County; CURTIS MARTIN, individually )  
and as deputy sheriff and agent of Jefferson )  
County; CRAIG DOOLITTLE, individually )  
and as the sheriff and agent of Jefferson )  
County; JEFFERSON COUNTY, )  
a political subdivision of the )  
State of Montana; and JOHN DOES I-X, )

Defendants. )

CV-07-12-BU-RFC

ORDER ADOPTING  
FINDINGS AND  
RECOMMENDATION OF  
UNITED STATES  
MAGISTRATE JUDGE

On April 2, 2008, United States Magistrate Judge Carolyn Ostby entered her Findings and Recommendation. Magistrate Judge Osbty recommends Jefferson County Defendants' Motion to Dismiss Count 8 of the First Amended Complaint, and Motion to Dismiss and Motion for Summary Judgment, and Motion to Strike Counts 1 through 7 of the First Amended Complaint be treated as motions for summary judgment and be granted, and that judgment on all claims be entered in favor of Jefferson County Defendants, except to Count 1, malicious prosecution, which should be dismissed without prejudice.

Upon service of a magistrate judge's findings and recommendation, a party has 10 days to file written objections. 28 U.S.C. § 636(b)(1). In this matter, Defendants Jefferson County and Jefferson County Deputies filed objections on April 11, 2008. Plaintiffs filed objections and a response to Defendants' objections on April 21, 2008. The objections are not well taken.

After a de novo review, the Court determines the Findings and Recommendation of Magistrate Judge Ostby are well grounded in law and fact and HEREBY ORDERS they be adopted in their entirety.

In Montana, six elements comprise a malicious prosecution claim:

(1) a judicial proceeding was commenced and prosecuted against the plaintiff; (2) the defendant was responsible for instigating, prosecuting, or continuing such proceeding; (3) there was a lack of probable cause for the defendant's acts; (4) the defendant was actuated by malice; (5) the judicial proceeding terminated favorably for plaintiff; and (6) the plaintiff suffered damage.

*Plouffe v. Mont. Dept. Pub. Health and Human Services*, 2002 MT 64, ¶16, 309 Mont. 184, ¶16, 45 P.3d 10, ¶16.

A cause of action for malicious prosecution does not accrue until favorable termination for the plaintiff occurs. *Rouse v. Anaconda-Deer Lodge County*, 250 Mont. 1, 7, 817 P.2d 690, 694 (1991) (overruled on other grounds by *Stratemeyer v. Lincoln County*, 276 Mont. 67, 74, 915 P.2d 175, 179 (1996)). Here, the parties agree that charges are still pending against Melanie Parrish. Therefore, any malicious prosecution claim must be dismissed without prejudice because that claim has not yet accrued.

Regarding the remaining claims, the dispositive issue is whether these claims are barred by the applicable statute of limitations. The Amended Complaint was filed more than three years after the search warrant was executed on October 22, 2004. Because of this, the Plaintiffs' claims are time-barred unless they show that either: (1) the claims against the Jefferson County Defendants relate back to the original Complaint, pursuant to F.R.Civ.P. 15(c), or (2) their claims against Jefferson County Defendant are for on-going torts which did not terminate until at least May 18, 2005. This Court agrees with Magistrate Ostby that neither argument succeeds.

First, Plaintiffs' claims in the Amended Complaint against the Jefferson County Defendants do not relate back to Melanie Parrish's claims against the Madison County Defendants in the original Complaint. Here there was no mistake as to the Jefferson County Defendants' identities. The original Complaint expressly identified defendants McFadden and Martin as Jefferson County deputies present and assisting in executing the warrant. Melanie Parrish made a conscious choice of whom to sue. There is no suggestion that this is an instance of mistaken identity, and relation back through Rule 15(c) is unavailable.

Second, the only alleged conduct in the Amended Complaint which arguably constitutes an ongoing tort is the ongoing prosecution of Melanie Parrish. This malicious prosecution claim

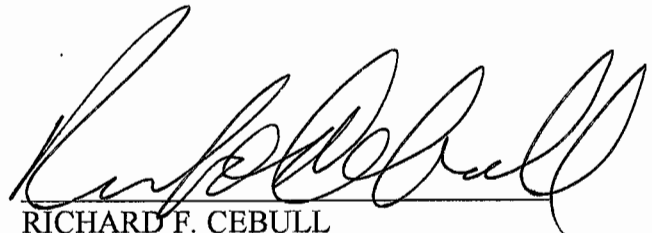
against the Jefferson County Defendants has not yet accrued, and does not allow any of the Parrishes' other claims to evade the statute of limitations.

Accordingly, **IT IS HEREBY ORDERED** that Jefferson County Defendants' Motion to Dismiss Count 8 of the First Amended Complaint [*doc. #35*], and Motion to Dismiss, Motion for Summary Judgment, and Motion to Strike Counts 1 through 7 of the First Amended Complaint [*doc. #36*] be treated as motions for summary judgment and be **GRANTED**.

The Clerk of Court is directed to enter judgment on all claims in favor of Jefferson County Defendants, except for Count 1, malicious prosecution, which should be **DISMISSED WITHOUT PREJUDICE**.

The Clerk of Court shall notify the parties of the making of this Order.

DATED this 23<sup>rd</sup> day of April, 2008.

  
RICHARD F. CEBULL  
UNITED STATES DISTRICT JUDGE